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BRIEF IN OPPOSITION TO MOTION TO RECALL AND AMEND MANDATE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER,

versus

WEST VIRGINIA PULP AND PAPER COMPANY,
RESPONDENT

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Columbia, S. C.,
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The R. L. Bryan Company, Legal Printers, Columbia, S. C.

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BRIEF IN OPPOSITION TO MOTION TO RECALL AND AMEND MANDATE

United States Circuit Court of Appeals

OCTOBER TERM, 1946

No. 184

A. N. CONE, PETITIONER,

versus

WEST VIRGINIA PULP AND PAPER COMPANY, RESPONDENT

I

REASONABLE NOTICE OF THE MOTION WAS NOT GIVEN RESPONDENT

Notice of this motion was served personally on Charles W. Waring, Esq., of counsel for respondent, by H. Wayne Unger, Esq., of counsel for petitioner, about five o'clock on the afternoon of May 21, 1947. The notice is dated May 17, 1947, and returnable on May 27, 1947. Mr. Unger declined an offer made by Mr. Waring to acknowledge service on the original. This service gave counsel for respondent four working days, including Saturday but excluding Sunday, within which to prepare and have printed any brief

to be filed by noon of May 27. It was and has been impossible for counsel for respondent to file this brief within that time. It was the good forturne of counsel for respondent, and apparently not within the contemplation of counsel for petitioner, that the Court recessed for two weeks, commencing May 26. The Clerk advised us that this Court will accept and consider this brief if filed during the first week of June. In such event we will suffer no prejudice and waive this objection; otherwise we are obliged to insist upon it.

II

THE MOTION IS NOT IN ORDER UNDER THE ESTABLISHED PRACTICE

The opinion of this Court herein was filed March 3, 1947. Its mandate was dated April 17, 1947, and marked filed in the District Court on April 19, 1947. The time within which a petition for rehearing could be filed under Rule 33 expired March 28, 1947.

This Court lost jurisdiction when its mandate went down; it "cannot grant a rehearing in a case which has been remitted to the court below." *Peck v. Sanderson*, 59 U. S. (18 How.), 42, 15 L. Ed., 262; *Browder v. McArthur*, 7 Wheat., 58, 5 L. Ed., 397.

This Court will not recall its mandate for the purpose of re-examining a cause on the merits (*Peck v. Sanderson, supra; Browder v. McArthur, supra*), or for the purpose of granting supplemental relief (*Sibbald v. U. S.*, 11 U. S. (2 How.), 455, 11 L. Ed., 337), although it has done so to correct a clerical error in the name of a party in the title of the cause. (*Killian v. Ebbinghaus*, 111 U. S., 798, 28 L. Ed., 593.)

III

THE MANDATE OF THIS COURT HAS BEEN COMPLIED WITH

There was no judgment of record in favor of Cone in the District Court upon which execution could lawfully issue on May 2, 1947. District Judge Waring entered an order on April 1, 1946, pursuant to the mandate of the Circuit Court of Appeals, which provided that the original judgment entered in favor of Cone on June 5, 1945, for $15,000.00, with interest, and costs, "be and the same is hereby reversed and set aside and that the Clerk make appropriate entries accordingly." A certified copy of this order is attached hereto as Exhibit "A". Appropriate entries were made by the Clerk. The result was that the original judgment was reversed and set aside. It thereupon ceased to exist as a basis for issuance of execution.

The mandate of the Supreme Court was dated April 17 and filed in the District Court on April 19, 1947, but no steps or proceedings had been taken pursuant thereto by the District Court prior to May 12, 1947. It follows that the order of the District Court of April 1, 1946, was still in force and effect, and that there was no legal basis for the issuance of execution. We submit, therefore, that there was no legal step that Judge Waring could take as of May 12, 1947, except to "set aside, cancel and stay the execution," as he did in his order of May 13, 1947.

If Cone desired to lawfully issue execution, his first requisite step was to secure vacation of the order of the District Court entered April 1, 1946, Exhibit "A" hereto, unless the mandate of this Court had commanded the District Court to reinstate the original judgment in favor of Cone. In such event the District Court could have taken appro-

priate action *ex parte*. This was the question that Judge Waring primarily considered and decided in his order of May 13, 1947. His decision was contra Cone's contention, and, we submit, was unquestionably correct.

When *Mutual Life Ins. Co. v. Hill*, 193 U. S., 551, 48 L. Ed., 788, came on for a second hearing in the Supreme Court question arose as to the effect of the first judgment of the Supreme Court, whereby the judgment below had been reversed and the case remanded for further proceedings. The court, speaking through Mr. Justice Brewer, said in part:

> "* * * Clearly, the contention of the plaintiffs is not sustainable. When a case is presented to an appellate court it is not obliged to consider and decide all the questions then suggested or which may be supposed likely to arise in the further progress of the litigation. If it finds that in one respect an error has been committed so substantial as to require a reversal of the judgment, it may order a reversal without entering into any inquiry or determination of other questions. While undoubtedly an affirmance of a judgment is to be considered an adjudication by the appellate court that none of the claims of error are well founded,—even though all are not specifically referred to in the opinion,—yet no such conclusion follows in case of a reversal. It is impossible to foretell what shape the second trial may take or what questions may then be presented. **Hence the rule is that a judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.** An actual decision of any question settles the law in respect thereto for future action in the case. Here, after one judgment on the pleadings had been set aside, on amended pleadings a trial was had, quite a volume of testimony presented, and a second judgment entered. That judgment is now before us for review, and all questions which appear upon the

record and have not already been decided are open for consideration." (Emphasis added.)

On the second appearance of *Wolff Packing Co. v. Court of Industrial Relations*, 267 U. S., 552, 69 L. Ed., 785, the Court, speaking through Mr. Justice Van Devanter, said in part:

"Both parties rely on our decision when the case was first here. One insists that by reversing the original judgment of the state court, and not merely a part of it, we adjudged the invalidity of the entire act; and the other that by particularly declaring the provisions permitting the fixing of wages invalid and saying nothing about the provisions permitting the fixing of hours of labor we impliedly held the latter valid. Both contentions are wrong. 'A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.' *Mutual L. Ins. Co. v. Hill*, 193 U. S., 551, 553, 48 L. Ed., 788, 791, 24 Sup. Ct. Rep. 538."

In *Gulf Refining Co. v. U. S.*, 269 U. S., 125 at 135, 70 L. Ed., 195 at 198, this Court said:

"The government first contends that the decrees are not final and that the appeals should be dismissed because the court of appeals remanded the cases 'for further proceedings not inconsistent with the opinion of this court.' The general rule established by many decisions, of which *Haseltine v. Central Nat. Bank*, 183 U. S. 130, 46 L. Ed. 117, 22 Sup. Ct. Rep. 49, is an example, is that the face of the judgment is the test of its finality and that by this test a judgment of reversal remanding the cause for further proceedings in conformity with the opinion of the court ordinarily is not final. But the direction to proceed consistently with the opinion of the court has the effect of making the opinion a part of the mandate, as though it had been therein set out at length. *Metropolitan Water Co. v.*

Kaw Valley Drainage Dist. 223 U. S. 519, 523, 56 L. Ed., 533, 535, 32 Sup. Ct. Rep. 246. * * *"

The mandate here expressly requires that the opinion be considered, so that recourse need not be had to any rule of construction to reach this result. The mandate of the Supreme Court (second paragraph on page two) first reversed with costs the judgment of the Circuit Court of Appeals, providing that Cone recover "$700.79 for his costs herein expended and have execution therefor." In the third paragraph on page two, the Supreme Court remanded the cause to the District Court "for proceedings **in conformity with the opinion of this Court.**" The formal conclusion (fourth paragraph on page two) commands "that such execution and proceedings be had in said cause **in conformity with the opinion** and judgment of this Court," as according, etc., * * * "ought to be had, the said writ of *certiorari* notwithstanding." (Emphasis added.)

There is nothing in this mandate to justify the contention of opposing counsel. The "execution" last mentioned is manifestly the execution for costs in the Supreme Court, referred to in the second preceding paragraph. The "proceedings (to) be had in said cause" are manifestly the "proceedings in conformity with the opinion of this Court", as directed in the paragraph immediately preceding. The result is that the mandate itself refers to the opinion of the Supreme Court and we now briefly analyze this.

The first paragraph of the opinion gives a concise history of the case in the District Court.

The second paragraph of the opinion divides the opinion of the Circuit Court of Appeals into two parts—the first holding that there was prejudicial error in the admission of evidence on the trial and that plaintiff's evidence showing possession was insufficient to go to the jury. This paragraph

then emphasizes that (in the second part of its opinion) the Circuit Court of Appeals, instead of remanding the case for a new trial, directed that judgment be entered for defendant and thus construed Rule 50(b) in a manner, as the Supreme Court next explained, that raised the sole question that the Supreme Court intended to consider. The third paragraph of the opinion repeats and emphasizes this.

This brings the opinion to a discussion of the sole question decided by the Supreme Court, to wit, whether the Circuit Court of Appeals had power to direct entry of a judgment notwithstanding the verdict under Rule 50(b), where a timely motion for judgment *non obstante veredicto* had not been made as required by the Rule. The Supreme Court then decided that no such power existed. That is all that it did decide—this one question.

"Reversed", as used by the Supreme Court in concluding its opinion, means, giving effect to the context, "reversed in so far as we have considered the holdings of the Circuit Court of Appeals". This was only the holding of the Circuit Court of Appeals that it had power to direct the entry of judgment, instead of granting a new trial. Any other construction would charge the Supreme Court with having reversed the Circuit Court of Appeals' holdings when the Supreme Court expressly excluded these from consideration—as the Supreme Court itself immediately emphasized by saying that it accepted, "without approving or disapproving, the Circuit Court of Appeals' holding that there was prejudicial error in the admission of evidence and in the submisson of the case to the jury".

The best argument to support our contention as to the limited effect of the judgment of the Supreme Court is to contrast illustrative opinions in cases where the Supreme Court manifestly intended that a money judgment entered

on a verdict for plaintiff in the district court, which had been reversed by the court of appeals, should be reinstated under the accepted rule quoted from the cases cited *supra*. The controlling test, of course, is whether the Supreme Court itself reviewed the evidence and decided that it was sufficient to go to the jury. It is not reasonable to impute to this Court an intention to adjudicate as to the merits when the Court has not considered the merits. This would hardly be in accord with due process of law. Three such cases are cited by way of history in this (Cone) opinion, to wit, *Conway v. O'Brien*, 312 U. S., 492, 85 L. Ed., 969; *Berry v. U. S.*, 312, U. S., 450, 85 L. Ed., 945; and *Halliday v. U. S.*, 315, U. S., 94, 86 L. Ed., 711.

The *Conway* suit was one for damages for personal injuries received by plaintiff while riding as a guest in defendant's automobile by reason of the alleged gross negligence of defendant. The *Berry* and *Halliday cases* were suits on policies of war risk insurance wherein plaintiff bore the burden of proving his disability, which was the controlling fact in issue. In each case the district court had refused a motion to direct a verdict for defendant and judgment had been entered for plaintiff on a verdict of the jury. In each case the circuit court of appeals had reversed the judgment below and had dismissed the action or remanded the case to the district court with direction to enter judgment in favor of defendant. In each case the Supreme Court granted *certiorari* without limiting the writ (as it did in this (*Cone*) *case*) to questions of Federal procedure. In each case the Supreme Court considered and reviewed the evidence for plaintiff in detail and itself held that it was sufficient to take the case to the jury.

In the *Conway case* the last paragraph of the opinion by Mr. Justice Reed reads: "We reverse the judgment of

the Circuit Court of Appeals and affirm that of the District Court".

In the *Berry case* the last sentence of the opinion by Mr. Justice Black reads: "The judgment of the Circuit Court of Appeals is reversed, and that of the District Court is affirmed".

In the *Halliday case* the last paragraph of the opinion by Mr. Justice Byrnes reads: "The case is remanded to permit the reinstatement of the judgment of the District Court".

We have already pointed out that in this (*Cone*) *case certiorari* was limited to questions of Federal procedure and that the Supreme Court did not review or consider either of the two holdings going to the merits upon which the Circuit Court of Appeals reversed the judgment of the District Court, but expressly accepted both of these. There can be no doubt that the result intended and accomplished by the Supreme Court here was a new trial in the District Court.

IV

A. DEFENDANT MADE A MOTION FOR A NEW TRIAL IN THE DISTRICT COURT

We attach hereto as Exhibit "B" a certificate of the Clerk of the District Court dated May 23, 1947, copying an entry in the official minutes of the District Court with respect to the proceedings had in this cause, showing that a motion by defendant for new trial was made on May 22, 1945—that the same was argued by Mr. Waring, and that the motion was refused and exception noted.

We attach also, as Exhibit "C", an order by Honorable J. Waites Waring, United States District Judge, be-

fore whom the cause was tried, filed December 3, 1945, ordering the Clerk of the District Court to send this order to the Circuit Court of Appeals, as an "Order amending the Transcript of Record to show that immediately after verdict, the Defendant, West Virginia Pulp & Paper Company, moved for a new trial, stating as grounds for new trial the same points listed by the Defendant in its motions to dismiss and for a directed verdict; let the record further show that on hearing the said motion was refused".

This *ex parte* order clearly indicates that it was passed on the suggestion of plaintiff's attorneys by its recital, to wit, "it having been brought to my attention by Plaintiff's Attorneys that the stenographic record is incomplete".

We also call attention to page 139 of the Transcript of Record in this Court, where is found among the Minute Entries of proceedings in the Circuit Court of Appeals, the following:

> "December 6, 1945, certified copy of order of District Court amending the transcript of record is filed.
>
> Note: This appears at page 232a of the complete transcript of record and is, therefore, omitted here."

We do not have access to page 232a of the complete transcript of record referred to in the entry; we assume that this is filed with the Clerk of this Court. These minute entries further show that the case was argued on January 10, 1946, before the Circuit Court of Appeals.

In the face of this record, which indicates that the order supplementing the record to show that this motion for a new trial was made in the District Court was originated by plaintiff's attorneys, it is difficult for us to understand how the same counsel can now assert to this Court in this Motion and brief that no such motion was made in the District Court.

We state frankly to the Court that we have always been and still are of the firm opinion that the question whether a motion for a new trial was made in the District Court was and is entirely irrelevant to any question raised on the appeal to the Circuit Court of Appeals or on the *certiorari* from this Court. We later give our grounds and reasons for this view. But the opinion of this Honorable Court has shown that we were wrong in our opinion as to the meaning of Rule 50(b), and it may well be that we are wrong in our opinion that the question whether a motion for a new trial was made in the District Court is utterly irrelevant. If so, we ask this Court to bear in mind, if it should give further consideration to this extraordinary motion, that the record before this Court shows that defendant made a motion for a new trial in the District Court.

IV

B. AS TO THE JURISDICTION OF THE CIRCUIT COURT OF APPEALS

Petitioner's motion and brief, if we read them correctly, ask this Court to amend and enlarge its opinion by filing a memorandum opinion making it clear that this Court adjudged that the Circuit Court of Appeals was utterly without jurisdiction and its judgment an absolute nullity, because respondent (as defendant below) made no motion for a new trial in the District Court. This motion impliedly admits that this Court has actually made no such adjudication and asks that it recall the mandate at this late day and do so now. This Court will hardly consider this phase of the motion in view of the fact, shown in subdivision A of this point, that such a motion was in fact made. Thereby this phase of the motion is rendered academic.

It seems fantastic to suggest that this Court will now, or on such a motion as this, consider and decide this question. Petitioner, as appellee in the Circuit Court of Appeals, made no motion there to dismiss the appeal. There was no suggestion in his brief there that the Circuit Court of Appeals was without jurisdiction, on this or any other ground. The Circuit Court of Appeals did not either consider or decide any such question, or refuse or fail so to do, because no such question was raised before it. Apart from the manifest truism that no such question was brought before this Court by the limited writ of *certiorari*, the opinion of this Court shows that, in truth and fact, no such question was considered by it. Such question was not mentioned in any of the briefs filed in this Court or in oral argument.

It is our understanding that opposing counsel contend that this Court construed Rule 50(b) of the Federal Rules of Civil Procedure as putting into effect in federal practice the rule of procedure that prevails in some jurisdictions, only by virtue of statutory provisions or rules of court, "that errors occurring during the progress of the trial shall be made the basis of a motion for a new trial as a prerequisite to the consideration of such errors on appeal". 4 C. J. S., page 770, sec. 352. This is the first suggestion that we have heard that Rule 50(b) works such a material innovation in federal practice. We have never heard a suggestion that this new trial rule applied in the federal courts in an active practice in such courts in this State extending over some forty years.

An examination of the authorities—as careful and exhaustive as we could make in the limited time allowed—discloses only three federal cases in which the contention has been made that a motion for a new trial is a condition prerequisite to the consideration on appeal of errors made during the course of the trial, to wit; *Aaron v. U. S.* (C. C.

A.-8), 155 F. 833, 838; *Boatmen's Bank v. Trower Bros. Co.* (C. C. A.-8), 181, F. 804, 806; *Chicago Life Ins. Co. v. Tiernan* (C. C. A.-8), 263, F. 325, 330. The opinions in the last two cases are by Judge Sanborn. All three cases hold that such a rule does not exist in federal practice and that the Conformity Act does not apply. We take it that the paucity of cases is due to the fact that this suggestion has so seldom been made.

In passing we note that the Supreme Court of South Carolina has periodically reiterated that this new trial rule does not apply in this State. The latest decision is *Bell v. Atlantic Coast Line R. Co.*, 202 S. C., 160, 24 S. E. (2d), 177. A reader of that case will note that the first opinion, by Chief Justice Bonham, is a minority opinion, and that the second opinion, by Mr. Associate Justice Fishburne, is the opinion of the Court, because the other three justices concurred therein.

This Court would hardly work such a change in federal practice without considering the question and expressing its intention so to do, after giving counsel an opportunity to be heard thereon. If the Court intended to bring about such a change, we submit that it did not express such intention in its opinion. The opinion does not use the words "motion for a new trial", except that in stating the facts it reads "The respondent moved for a new trial on the ground of newly discovered evidence". Thereafter it refers to "a motion for judgment notwithstanding the verdict". The *ratio decidendi* is that "In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand".

Rule 50(b) does not require either litigant to make a motion for a new trial for any purpose or at any time; it

merely carries this permissive sentence: "A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative".

Rule 59 relates to new trials and provides, in so far as concerns an action in which there has been a trial by jury (which is our case), that a new trial may be granted "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States". There is nothing in this rule, or any other of the Federal Rules of Civil Procedure, or in any rule of court, or in any federal statute, which touches the startling innovation in federal practice that opposing counsel suggest has been worked by the opinion of this Court in this case, in so far as we have ever heard or have been able to discover.

Rule 52(b) of the Federal Rules of Civil Procedure somewhat relaxes the former requirements for a review in the appellate court of findings of fact made in actions tried by the court without a jury, by providing that a party litigant need not, in order to save his right to a review thereof by the appellate court, even make an objection to such findings or make a motion to amend them or a motion for judgment in the District Court.

Rule 46 liberalizes the former rule as to formal exceptions. While Rule 72 preserves the former requirement of an assignment of errors on appeal from a District Court to this Court, this requirement has been relaxed in respect of appeals to a Circuit Court of Appeals. This indicates a relaxation of technical and useless requirements.

The transcript of record shows affirmatively that an exception was allowed defendant below in respect of each of its two motions to strike out the testimony, and also of the refusal of defendant's motion for a directed verdict (pages 42 44). There was not a suggestion made in the

brief or in the oral argument before the Circuit Court of Appeals that defendant had not saved its right to have both these questions considered and decided on the appeal. There was no basis for such a suggestion then, and there is no basis for such a suggestion now.

A careful re-reading of *Montgomery Ward & Co. v. Duncan*, 311 U. S., 243, 85 L. Ed., 147, cited by petitioner, does not suggest to our mind any relation between the *ratio decidendi* of that case and the question here under consideration. Our view is confirmed by the fact that this Court did not cite that case in its opinion.

We read *Aspen Mining, etc., Co. v. Billings*, 150 U. S., 31, 37, 37 L. Ed., 986, 988, as conclusive authority that this Court will not decide any question as to the jurisdiction of the Circuit Court of Appeals on this motion.

V

AS TO SETTING OFF THE JUDGMENT FOR COSTS

Judge Waring followed the general rule which applies in South Carolina and is stated in *Rookard v. Atlanta & C. A. L. Ry. Co.*, 89 S. C., 371, 376, 71 S. E., 992:

> "The jurisdiction of the Court to set off one judgment against another is equitable in its nature, and should be exercised so as to do justice between parties. It is not founded on any statute or fixed rule of Court, but grows out of the inherent equitable jurisdiction which the Court exercises over suitors in it. Such motions are, therefore, addressed to the discretion of the Court—a discretion which is not arbitrarily or capriciously exercised, but according to settled principles. *Ex parte* Hiers, 67 S. C., 114, and cases cited. When it would result inequitably, set off should be refused. On the other hand, it should be allowed, when justice requires it, unless the Court is compelled to refuse it in

obedience to some provision of the Constitution or statutes."

We submit that Judge Waring was right in holding that respondent was the prevailing party on the appeal to the Circuit Court of Appeals, after the mandate of this Court came down, and was then entitled immediately to execution of the judgment for its costs in the Circuit Court of Appeals. The costs in the District Court, taxed in favor of Cone and entered in the original judgment, will abide the event of the second trial. *Land Oberoesterreich v. Gude* (C. C. A. 2), 93 F. Rep., 292.

We submit, further, in respect of this matter of costs in the Circuit Court of Appeals, as well as the matter of set-off, that it is a question to be considered on appeal to the Circuit Court of Appeals and one that should not be taken over and decided by this Court on this motion.

VI

AN INCORRECT STATEMENT

The incorrect statement is found on typed page 7 of the brief where opposing counsel now say, in effect, that the parol evidence to prove title, which was held incompetent and prejudicial by the Circuit Court of Appeals, related to the deed from plaintiff's grandfather to plaintiff's father and was not introduced to supply the missing link or deed between plaintiff's father and his mother. The brief then goes on to argue that if a motion for a new trial had been made, the District Judge would have pointed out that defendant had waived its objection to this evidence by itself introducing a certified copy of the deed, to the proof of which the evidence was directed. (Defendant's Ex. D-13, Transcript, page 68.) The petition for *certiorari* and supporting brief asserted (page 19) that this parol testimony was directed to prove possession of the tract of land

in question by plaintiff's mother, father and grandfather. We pointed out the error of this statement, commencing about the middle of page 3 of our brief in opposition to *certiorari*. The brief filed by petitioner on *certiorari* (page 24) renewed this contention which we answered, commencing about the middle of page 23 in our brief on *certiorari*.

Petitioner now switches to the contention that the parol testimony related to the deed from the grandfather, Adam Miles Cone, to the father, Miles Cone, which plaintiff introduced as Ex. P-C (at page 6 of the Transcript). This is the same deed, another certified copy of which was introduced by defendant as defendant's Ex. D-13 (at page 68 of the Transcript). The brief here asserts (typed page 7) that defendant had previously given notice of its intention to introduce this deed, along with a plat which was not attached to the certified copy of this same deed that plaintiff had introduced as his Ex. P-C.

It is utterly incomprehensible to us why plaintiff would want to introduce parol evidence to prove a duly recorded deed that was in existence, of which both parties had certified copies, which was introduced by plaintiff and concerning which defendant had given plaintiff previous notice of its intention to introduce the same. The present proposition seems to be utterly fantastic and to answer itself.

Respectfully submitted,

CHRISTIE BENET,
J. B. S. LYLES,
Columbia, S. C.,
D. A. BROCKINTON,
CHARLES W. WARING,
Charleston, S. C.,
Attorneys for Respondent, West Virginia Pulp and Paper Company.

EXHIBIT "A"

Order

Civil Action No. 1227

Pursuant to the mandate of the United States Circuit Court of Appeals, Fourth Circuit, filed in this Court and to comply therewith:

IT IS ORDERED That the judgment entered in this Court in favor of the plaintiff against the defendant on June 5, 1945, in the sum of Fifteen Thousand and no/100 ($15,000.00) Dollars, on the verdict of the jury, together with interest thereon from May 22, 1945, at six per centum (6%), and together with Eighty-seven and 70/100 ($87.70) Dollars, costs, be and the same is hereby reversed and set aside and that the Clerk make appropriate entries accordingly; and

IT IS FURTHER ORDERED That the Clerk do forthwith enter judgment for the defendant and that the Clerk tax the costs which defendant is entitled to recover of plaintiff and enter judgment in favor of the defendant against plaintiff therefor; and

IT IS FURTHER ORDERED That the removal bond and the appeal bond filed by the defendant in this cause be and the same are hereby cancelled, and the principal and sureties thereupon are exonerated from any and all liability in connection therewith.

J. WATIES WARING,
United States District Judge.

Charleston, S. C.,
April 1st, 1946.

A TRUE COPY, ATTEST
ERNEST L. ALLEN,
Clerk of U. S. District Court
Eastern District of South
Carolina (SEAL)

EXHIBIT "B"

Certificate of Clerk

Civil Action No. 1227

I, Ernest L. Allen, Clerk of the District Court of the United States for the Eastern District of South Carolina, do hereby certify that the official minutes of the Court with respect to the proceedings had in the above entitled cause contain the following entry:

"The Court opened at Charleston, S. C., on May 22, 1945, according to adjournment, Honorable J. Waties Waring presiding.

Appearances: Jefferies, McLeod & Unger, J. P. Mozingo for Plaintiff; Waring & Brockinton for Defendant.

Motion by Defendant for new trial—(Motion refused and exception noted.)

Arguments: Pro motion, Mr. Waring."

I do further certify that in the official minutes of the Court with respect to further proceedings in the above entitled cause had on August 6, 1945, there appears the following entry:

"Motion by Defendant for new trial on ground of newly discovered evidence."

WITNESS my hand and official seal the 23rd day of May in the year of our Lord one thousand nine hundred and forty-seven.

/s/ ERNEST L. ALLEN. (SEAL)

EXHIBIT "C"

Order

Civil Action No. 1227

The above-entitled case having been appealed to the Circuit Court of Appeals, and the Transcript of Record hav-

ing been previously certified, together with the original exhibits, and it having been brought to my attention by Plaintiff's Attorneys that the stenographic record is incomplete, in that the stenographic transcript does not show that the Defendant moved for a new trial immediately after verdict was rendered basing said motion on the same grounds as previous motions by Defendants to dismiss and for a directed verdict which are set forth in the transcript; that said motion for a new trial on said grounds was refused by me; and pursuant to authority vested in me by Rule 75 (H), under Rules of Civil Procedure, it is

ORDERED that the Clerk of this Court send up to the Circuit Court of Appeals for the Fourth Circuit, this Order amending the Transcript of Record to show that immediately after verdict, the Defendant, West Virginia Pulp and Paper Company, moved for a new trial, stating as grounds for new trial the same points listed by the Defendant in its motions to dismiss and for a directed verdict; let the record further show that on hearing the said motion was refused.

J. WATIES WARING,

J. WATIES WARING, United States District Judge.

Charleston, South Carolina,
December 3, 1945.

A TRUE COPY, ATTEST
/s/ ERNEST L. ALLEN,
Clerk of U. S. District Court
Eastern District of South Carolina (SEAL)

J. WATIES WARING,
U. S. District Judge.

PROOF OF SERVICE

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

Personally appears Berta Wallace, who, being first duly sworn, says that she is secretary to J. B. S. Lyles, Esq., one of the attorneys for the respondent in the above cause; that on the 30th day of May, 1947, at 10:55 o'clock in the A. M., she deposited in the United States mail chute in the Liberty Life Building, Columbia, South Carolina, a sealed envelope carrying the requisite amount of postage and addressed to H. Wayne Unger, Esq., Attorney at Law, Walterboro, South Carolina, and that the said envelope contained a carbon copy of the within brief.

BERTA WALLACE.

Sworn to and subscribed before me this 30th day of May, 1947.

(SEAL)

W. C. McGOWAN,

Notary Public for South Carolina.

My commission expires at the pleasure of the Governor.

SUPREME COURT OF THE UNITED STATES

No. 184.—October Term, 1946.

A. N. Cone, Petitioner,
v.
West Virginia Pulp and Paper Co.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[March 3, 1947.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner brought this action in a South Carolina state court. Upon motion of respondent, it was removed to the Federal District Court because of diversity of citizenship of the parties. The complaint claimed $25,000 damages upon allegations that the respondent's agents had trespassed upon and cut timber from lands owned by and in the possession of the petitioner. Respondent's answer denied that the petitioner had title or possession of the lands and timbers. Both title and possession became crucial issues in the trial. The burden of proving them rested on the petitioner.[1] When all the evidence of both parties had been introduced, the respondent moved for a directed verdict in its favor on the ground that the petitioner had failed to prove that he either owned or was in possession of the land.[2] This motion was

[1] Under governing South Carolina law an action such as this is not one to try title but "to recover damages for trespass of property of which the plaintiff was in possession." *Macedonia Baptist Church* v. *City of Columbia*, 195 S. C. 59, 70. But possession may be presumed from proof of legal title. *Beaufort Land and Investment Co.* v. *New River Lumber Co.*, 86 S. C. 358; *Haithcock* v. *Haithcock*, 123 S. C. 61; Code of Laws of South Carolina (1942) § 377. Petitioner here undertook to prove possession both by showing that he had legal title and by showing that he had openly and notoriously exercised acts of dominion, possession, and ownership over a long period of years.

[2] Respondent first moved to dismiss the case on the same grounds under Rule 41 (b) of the Rules of Civil Procedure. That rule pro-

denied. The jury returned a verdict for petitioner for $15,000, and the court entered judgment on the verdict. The respondent moved for a new trial on the ground of newly discovered evidence. This motion was denied. Respondent did not move for judgment notwithstanding the verdict as it might have done under Rule 50 (b) of the Federal Rules of Civil Procedure, which is set out below.[3]

The Circuit Court of Appeals decided that the admission of certain evidence offered by the petitioner to prove legal title was prejudicial error. It held that without this improperly admitted evidence petitioner's proof was not sufficient to submit the question of title to the jury. That court also held that petitioner's evidence showing possession was insufficient to go to the jury. It therefore reversed the case. But instead of remanding it to the District Court for a new trial, the Circuit Court of Appeals

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vides for a dismissal, under the circumstances and conditions there set out where "upon the facts and the law the plaintiff has shown no right to relief." Since substantially the same disposition of the case on the same grounds was later requested by respondent in the motion for a directed verdict, we shall have no occasion further to discuss the motion to dismiss.

[3] 50 (b) "RESERVATION OF DECISION ON MOTION.—Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict. . . . A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

directed that judgment be entered for respondent. That court has thus construed Rule 50 (b) as authorizing an appellate court to direct a judgment notwithstanding the verdict, even though no motion for such a judgment had been made in the District Court within ten days after the jury's discharge.

The petition for certiorari challenged the power of an appellate court to direct entry of a judgment notwithstanding the verdict where timely motion for such a judgment had not been made in the District Court. On three previous occasions we have granted certiorari to consider this point but failed to reach it because, upon examination of the evidence, we found it sufficient to justify submission of all three cases to the jury. *Conway* v. *O'Brien*, 312 U. S. 492; *Berry* v. *United States*, 312 U. S. 450; *Halliday* v. *United States*, 315 U. S. 94. In this case we granted certiorari "limited to the questions of federal procedure raised by the petition for the writ." — U. S. —. The point we had in mind was whether a party's failure to make a motion in the District Court for judgment notwithstanding the verdict, as permitted in Rule 50 (b), precludes an appellate court from directing entry of such a judgment. Other questions have been discussed here, but we do not consider them. Consequently, we accept, without approving or disapproving, the Circuit Court of Appeals' holding that there was prejudicial error in the admission of evidence and in the submission of the case to the jury.

Rule 50 (b) contains no language which absolutely requires a trial court to enter judgment notwithstanding the verdict even though that court is persuaded that it erred in failing to direct a verdict for the losing party. The rule provides that the trial court "may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed." This "either-or" language means what it seems to mean, namely, that there are circumstances which might lead the

trial court to believe that a new trial rather than a final termination of the trial stage of the controversy would better serve the ends of justice. In short, the rule does not compel a trial judge to enter a judgment notwithstanding the verdict instead of ordering a new trial; it permits him to exercise a discretion to choose between the two alternatives. See *Berry v. United States, supra*, 452–453.[4] And he can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses. His appraisal of the bona fides of the claims asserted by the litigants is of great value in reaching a conclusion as to whether a new trial should be granted. Determination of whether a new trial should be granted or a judgment entered under Rule 50 (b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart. See *March* v. *Philadelphia & West Chester Traction Co.*, 285 Pa. 413, 418; *Bunn* v. *Furstein*, 153 Pa. Super. 637, 638. See also *Yutterman* v. *Sternberg*, 86 F. 2d 321, 324. Exercise of this discretion presents to the trial judge an opportunity, after all his rulings have been made and all the evidence has been evaluated, to view the proceedings in a perspective peculiarly available to him alone. He is thus afforded "a last

[4] The Advisory Committee on Rules for Civil Procedure in commenting on Rule 50 (b) stated that "A trial court or an appellate court in setting aside a verdict always has discretion, if justice requires it, to order a new trial, instead of directing the entry of judgment. Rule 50 (b) states that the court on a motion for judgment notwithstanding the verdict 'may either order a new trial or direct the entry of judgment' for the moving party." Report of Proposed Amendments to Rules of Civil Procedure (1946) 66. See also New York Symposium on Federal Rules (1938) 283–284. Compare *March* v. *Philadelphia & West Chester Traction Co.*, 285 Pa. 413; *Nadeau* v. *Maryland Casualty Co.*, 170 Minn. 326, 331; *Anderson* v. *Newsome*, 193 Minn. 157; *Porsmer* v. *Davis*, 152 Minn. 181; *Jackson* v. *Hansard*, 45 Wyo. 201, 218.

chance to correct his own errors without the delay, expense or other hardships of an appeal." See *Greer* v. *Carpenter*, 323 Mo. 878, 882. *Cf. United States* v. *Johnson*, 327 U. S. 106, 112.

There are other practical reasons why a litigant should not have his right to a new trial foreclosed without having had the benefit of the trial court's judgment on the question. Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reason to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has had an unqualified right, upon payments of costs, to take a nonsuit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit. *Pleasants* v. *Fant*, 22 Wall. 116, 122; *Jones* v. *S. E. C.*, 298 U. S. 1, 19–20 and cases cited. Rule 41 (a) (1) preserves this unqualified right of the plaintiff to a dismissal without prejudice prior to the filing of defendant's answer. And after the filing of an answer, Rule 41 (a) (2) still permits a trial court to grant a dismissal without prejudice "upon such terms and conditions as the court deems proper." [5]

In this case had respondents made a timely motion for judgment notwithstanding the verdict, the petitioner could have either presented reasons to show why he should have a new trial, or at least asked the court for permission to dismiss. If satisfied from the knowledge acquired from the trial and because of the reasons urged that

[5] Rule 41a (2), Federal Rules of Civil Procedure, has been interpreted as authorizing a plaintiff to dismiss his action "without prejudice where the court believes that although there is a technical failure of proof there is nevertheless a meritorious claim." Report of Proposed Amendments to Rules of Civil Procedure (1946) 64; see *United States* v. *Lyman*, 125 F. 2d 67, 138 F. 2d 509; *Home Owners Loan Corporation* v. *Huffman*, 134 F. 2d 314, 317.

the ends of justice would best be served by allowing petitioner another chance, the judge could have so provided in his discretion. The respondent failed to submit a motion for judgment notwithstanding the verdict to the trial judge in order that he might exercise his discretionary power to determine whether there should be such a judgment, a dismissal or a new trial. In the absence of such a motion, we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.

It has been suggested that the petitioner could have presented affidavits to the Circuit Court of Appeals to support his claim for a new trial, and that that court could thereupon have remanded the question to the District Court to pass upon it.[6] Such a circuitous method of determining the question cannot be approved. For Rule 50 (b) specifically prescribes a period of ten days for making a motion for judgment notwithstanding the verdict. Yet the method here suggested would enable litigants to extend indefinitely the prescribed ten day period simply by adoption of the expedient of an appeal. Furthermore, it would present the question initially to the appellate court when the primary discretionary responsibility for its decision rests on the District Court.

Reversed.

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[6] This general suggestion was made by the Advisory Committee on Rules for Civil Procedure in its recent recommendation to us for modification of Rule 50 (b). The Committee said: "Even on appeal, if the appellate court sets aside his verdict, he may present to the appellate court affidavits to support his claim to a new trial, and the appellate court has power to receive the affidavits and remand the case to the trial court with instructions to consider the affidavits and determine whether a new trial should be allowed." Report of Proposed Amendments, *supra*, 66.